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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES EX REL CARLOS MARCELLO,
Petitioner

v.

DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, NEW ORLEANS, LOUISIANA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether "reasonable, substantial and probative evidence on the record as a whole" can be found to sustain a denial of suspension of deportation where:

   a. The Board of Immigration Appeals failed to show that it considered any of the evidence of good moral character put forth by the appellee, but clearly considered all that put forth by the government.

   b. Remote, stale and pardoned convictions were used to preclude statutorily a finding of good moral character.

   c. A simple assault conviction was used to preclude a finding of good moral character.

2. Whether the Board of Immigration Appeals may deny suspension of deportation by ignoring the applicability of its own leading precedent decision.

3. Whether an illegal deportation in 1961 is relevant to the question of eligibility for suspension of deportation or eligibility for a waiver of inadmissibility under Section 212(c) of the Act, 8 U.S.C. 1182(c).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Carlos Marcello, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit which reversed the judgment of the District Court and affirmed that of the Board of Immigration Appeals.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A) is reported at 634 F.2d 964 and was filed on January 22, 1981. Its judgment of reversal was filed the same day (Ap-

pendix B). A petition for rehearing was denied on March 13, 1981 (Appendix C).

The opinion of the District Court, filed on July 13, 1979, is reported at 472 F.Supp, 1199 (Appendix D).

JURISDICTION

The judgment of the Court below was entered on January 22, 1981 and a petition for rehearing was denied on March 13, 1981. The jurisdiction of this Court is conferred pursuant to 28 U.S.C. 1254(1).

STATUTES INVOLVED

8 U.S.C. 1105(a)(1976) provides in part:

> "(9) any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings."

28 U.S.C. 2241 (1976) provides in part:

> "(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.***"
>
> *** ***
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless ***
>
> *** ***
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States; or"

8 U.S.C. 1182(a)(17)(1976) provides for the exclusion of:

"Aliens who have been arrested and deported. *** unless prior to their embarkation or reembarkation at a place outside the United States or their attempt to be admitted from foreign contiguous territory the Attorney General has consented to their applying or reapplying for admission."

8 U.S.C. 1182(c)(1976) provides:

"Aliens lawfully admitted for permanent residence who temprarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1)-(25), (3]) and (31) of subsection (a) of this section.***"

8 U.S.C. 1251(a)(1976) provides in part:

"(a) Any alien in the United States (including an alien crewman) shall upon order of the Attorney General, be deported who –

(1) at the time of entry was within one or more of the classes of aliens excludable by law existing at the time of such entry.

*** ***

(ii) is, or hereafter at any time after entry has been a narcotic drug addict, or who at any time has been convicted of a violation of, or conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana ***"

8 U.S.C. 1252(d)(1976) provides in part:

> Any alien against whom a final order of deportation as defined in subsection (c) of this section heretofore or hereafter issued shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General. Such regulations shall include provisions which will require any alien subject to supervision (1) to appear from time to time before an immigration officer for identification; (2) to submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper; and (4) to conform to such reasonable restrictions as are prescribed, by the Attorney General in his case. Any alien who shall willfully fail to comply *** shall be fined not more than $1,000 or imprisoned not more than one year or both."

8 U.S.C. 1254 (1976) provides in part:

> "(a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and ***
>
> (2) is deportable under paragraphs (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of

> section 1251(a) of this title; has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence."

STATEMENT

Appellee seeks to review a divided decision of the Board of Immigration Appeals (hereafter the Board) dated January 20, 1976 (R. 84, 89) affirming his deportation and denying his application for suspension of deportation under 8 U.S.C. 1254(a)(1976).

His undenied petition for habeas corpus and supporting papers (R. 1, 396, 437)* allege that he was born on February 6, 1910, in Tunis, Africa of italian parents, that this has been verified by his parents and by extensive investigation, that he was admitted for lawful permanent residence to the United States on October 7, 1910, and that he has resided here continuously since that date except for a period occasioned by an illegal kidnapping by agents of the Attorney General from April to May, 1961.

Appellee is married to an American citizen, has four American born children, six American born brothers, two

*(R.) refers to pages of the Record on Appeal.

American born sisters and eleven American born grandchildren (R. 2).

Appellee was ordered deported in 1953 upon the basis of a 1938 marihuana conviction for violation of 26 U.S.C. 2591 [*Marcello v. Bonds*, 349 U.S. 302 (1954)].

The petition alleges that the Immigration and Naturalization Service (INS) obtained a false Guatemalan birth certificate for appellee, that its top officials were aware that this birth certificate had been created by a convict, Carl Noll, whom they had interviewed (R. 2, 440). Documentary evidence was submitted that the INS Commissioner arranged for Marcello's deportation to Guatemala on April 4, 1961 so that opportunity to litigate its validity would be avoided (R. 452). Criminal Division memoranda represent that if Marcello denied birth in Guatemala, a litigable issue would be presented (R. 444, 455). Marcello was seized when reporting to the INS ppursuant to his parole and immediately deported to Guatemala on April 4, 1961 on a private INS plane without affording him an opportunity to consult his immigration attorney (R. 3, 458) nor was any notice given to counsel of Guatemala's designation as the place of deportation (R. 396).

While in Guatemala, Marcello sought judicial review in the District of Columbia. INS officials falsely and perjuriously represented that they believed Marcello was born in Guatemala. The District Court upheld the deportation but the case was eventually dismissed as moot, *Marcello* v. *Kennedy*, 196 F. Supp. 748 (D.C., 1961), 312 F. 2d 874 (D.C. Cir., 1962) cert. denied 373 U.S. 933 (R. 3).

Marcello returned to the United States in May, 1961 and on December 20, 1961 deportation was ordered on the

basis of illegal reentry and the marihuana conviction. In 1962 he was placed under supervised parole pursuant to 8 U.S.C. 1252(d)(1976). This requires Marcello *inter alia* to report to INS quarterly, and notify the authorities of departures from Louisiana for periods of more than 48 hours (R. 4).

On February 4, 1972, following the Fifth Circuit Court of Appeals' decision in *Marcello* v. *INS,* 449 F. 2d 349 (5th Cir., 1971), deportation proceedings were reopened solely to permit the filing of an application for suspension of deportation. On January 20, 1976 the Board of Immigration Appeals denied suspension on the ground that Marcello's criminal record precluded establishment of reformation or good moral character. It is asserted that the Board utilized improper standards and abused its discretion in denying relief (R. 5-6).

The majority of the Board (R. 84) ruled that the legality of the 1961 deportation was not germane to deportability or the suspension application. Reviewing appellee's 1930 assault and robbery conviction, pardoned in 1935, his 1938 marihuana conviction and a 1968 non-violent assault conviction on an FBI agent contrary to 18 U.S.C. 111 (1976) and the fact that he was a gambler in 1945-1951, the Board concluded that it found "no evidence of the type of character reformation that would warrant a finding of good moral character for the statutory period." The Board stressed that it could utilize the 1930 pardoned conviction as well as the 1968 conviction which was then within the 10 year period in 1976. It did not consider or mention that Marcello has been gainfully employed since 1961, that 49 character witnesses of various backgrounds attested to his presented good character and that his simple assault conviction did not bar relief.

The dissent (R. 89) believed that the validity of Marcello's 1961 deportation was relevant, that good moral character was not barred by statute or otherwise, that Marcello should not have been confined to a suspension application and that the denial failed to consider well established guidelines set forth in *Matter of S,* 5 I&N Dec. 409 (BIA, 1953).

The Government filed a motion to dismiss for lack of jurisdiction (R. 103), a return (R. 205) and thereafter a motion for summary judgment (R. 467).

In response to the District Court's suggestion and without objection from the Government, appellee filed an application for relief under 8 U.S.C. 1182(c)(1976) on May 7, 1979 (R. 551). The District Court upheld the appellee's right to bring habeas corpus proceedings (R. 193) and in a published decision, *U.S. ex rel Marcello* v. *District Director,* 472 F. Supp 1199 (E.D. La., 1979), (R. 574) upheld his claim that the 1961 deportation should be subject to attack for lack of due process and deprivation of counsel. It also upheld the dissenting Board Member's view that the decision on good moral character was not based upon all relevant factors and established guidelines. The case was remanded for additional fact-finding, assessment of the numerous character testimonials submitted and consideration of relief under 8 U.S.C. 1182(c)(1976).

On January 22, 1981, the Court of Appeals for the Fifth Circuit reversed the decision of the District Court, and affirmed the decision of the Board of Immigration Appeals. A petition for rehearing was denied on March 13, 1981, and this petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI

I. The divided Board on Immigration Appeals evinced two reasons for denying the appellee's suspension application: the appellee's "criminal record" precluded a finding of good moral character and, even if it did not, the appellee would still not be granted suspension as a matter of discretion.

The Board relied on four pieces of evidence to reach its conclusion that good moral character was not established. The Court of Appeals phrased it thus:

> "It did so on the basis of numerous facts detailed therein. Among these are a 1938 drug conviction, a 1930 state conviction for armed robbery, and a 1968 felony conviction for assault on a federal officer."

There were four facts detailed therein, three as noted above and the fourth an observation that the appellee derived some income from gambling "during at least a portion of this time." This last statement does not constitute evidence, as the record does not show that the gambling was illegal during this period when it occurred, over 30 years ago.

The three convictions that constitute the chief "evidence" of bad moral character, the "criminal record" of the appellee, are characterized by the Board as follows:

> "The respondent's criminal record covers a span of 38 years, going back to 1930."

It is extremely difficult to understand how three events in 38 years "covers" a "span." The Board's choice of words in its majority opinion can only be understood as an attempt to supply by diction what it lacked in evidence.

A. The 1930 conviction for assault and robbery

The Board maintained that this conviction could be used to prove that the appellee had not established good moral character during the preceding ten years. The Board did this in direct violation of its own rule in *Matter of H,* 6 I&N Dec. 619 (A.G. 1955) holding that an expungement, *being in the nature of a pardon,* removes the statutory bar to good moral character. The Board offers no explanation for this.

In addition, the conviction was then 46 years old. The Board does not elaborate how a 1930 pardoned conviction throws great light on the character of a man during the period 1966-1976.

In Louisiana law, it is clear that a pardon obviates *all disabilities* and cleanses all remnants of the conviction, as it is given to one who has been improperly convicted or who has sufficiently expiated his offense [*State* v. *Baptiste,* 26 La. Ann. 134 (1874); *State* v. *Lee* 171 La. 144, 132 So. 219 (1931); *State* v. *Taylor,* 172 La. 20, 133 So. 349 (1931).] This precept of law apparently does not concern the Board as no mention is made of it.

B. The 1938 conviction for possession of marihuana

Likewise, the Board does not amplify its unique position that a conviction 38 years old at the time clearly elucidates the character of a man during the period 1966-1976.

The Court of Appeals for the Fifth Circuit does not permit the use of convictions of such great age to be used for impeachment purposes. *Fire Association of Philadelphia* v. *Weathered,* 62 F.2d 78 (5th Cir., 1932); *Sinclair Refining Co.* v. *Southern Construction Co.,* 195 F.2d 626 (5th

Cir., 1952). The opinion of the Court does not elaborate on why they are probative on the question of good moral character in a suspension case.

Professor Wigmore, in his *Treatise on Evidence* [Vol. 3A, pp. 754, 755 (1970)] warns against the use of such convictions, stating that they

> "***must not be so distant in time to be void of real probative value in showing present character."

This holding is especially aberrant in view of the fact that the statute requires good moral character for ten years *and not earlier. [Marcantonio v. U.S.,* 185 F.2d 934 (4 Cir., 1950].

C. The 1968 Conviction for simple assault on a federal officer.

This offense does not involve moral turpitude [*Giambelli ex rel Maranci v. Johnson*, 12 F.2d 465 (D.C. Mass., 1926); *U.S. ex rel Zattarano v. Corsi*, 63 F.2d 757 (2 Cir., 1933)]. It is purely a police offense not even requiring scienter. [*U.S. v. Feola*, 420 U.S. 671 (1975)]. The Board does not explain how such a conviction, now 13 years old, can show bad moral character.

The above constitutes the entire evidence relied on by the Board in finding the appellee to be of bad moral character. This ephemera must now be contrasted with the fact that seven present or former law enforcement officials, five lawyers, seven medical professionals, five religious officials, three bankers and twenty-two businessmen testified that the appellee was a person of excellent moral character, despite the constant efflux of baseless press stories purporting to the contrary. He also

corroborated this evidence with his income tax returns, statement of assets, business records and other documents, all showing his respected position as a businessman in the community in which he lives for far longer than the required statutory period.

All this was ignored by the Board in favor of the "criminal record" elaborated above. The Court of Appeals stated:

> "***[T]here is no requirement that the Board set out expressly the evidence that it considered in arriving at its decisions***"

With all due respect to that Court, it is submitted that there is, and as a matter of elemental administrative due process, there *must be,* such a requirement. As this Court has held in *Burlington Truck Lines* v. *U.S.,* 371 U.S. 156, 158 (1962), any administrative agency is required to articulate a "rational connection between the facts found and the choice made."

In *Konigsberg* v. *California,* 353 U.S. 252, 264 (1957), the same situation occurred, and the Supreme Court noted:

> "A person called on to prove his character is compelled to turn to the people who know him. Here forty two individuals who had known Konigsberg at different times during the past twenty years attested to his excellent character*** Even more significant, not a single person has testified that Konigsberg's moral character was bad or questionable in any way."

The Government produced no witnesses in the instant case to show bad moral character. The appellee produced 49 witnesses to show his good moral character. The

remarkable failure of the Board to comment upon this evidence must be condemned. As Judge Kaufman stated in *U.S. ex rel Partheniades* v. *Shaughnessy,* 146 F. Supp. 772, 774-5 (S.D.N.Y. 1956):

> "The complete omission of any consideration of these factors by the Board, factors which it has considered in other cases, compels the conclusion that it was arbitrarily reached."

As the District Court found, the failure of the Board to weigh the evidence presented in a rational fashion led inexorably to the conclusion that it relied on "rumor and innuendo" in reaching its decision. As the Court of Appeals has shown by its attachment of Appendix A to it opinion, this rumor and innuendo is so pervasive that two Attorneys General have stooped to condemning the appellee as an "undesirable alien" and a "racketeer" in *press releases,* thereby creating the very climate which the District Court so rightly excoriates.

Both the dissenting Board opinion and the District Court felt that no one could have reached so bizarre a conclusion without reliance on this vast store of check-out counter journalism about the appellee. This Court should add the weight of its judgment to that conclusion.

2. In its opinion, the Board states that:

> "Even if the respondent were able to establish statutory eligibility for suspension of deportation, we would still deny such relief in the exercise of discretion."

It is in reaching this conclusion that the Board has most egregiously offended the principles of due process. One of the most elementary notions in administrative law is the

concept that applying different standards in similar cases is arbitrary and an abuse of discretion. See, e.g., *Del Mundo* v. *Rosenberg,* 341 F. Supp. 345 (C.D. Cal., 1972). The Court of Appeals has approved heartily of this proposition. See *Mary Carter Paint Co.* v. *FTC,* 333 F. 2d 654 (5th Cir., 1964).

Since 1953 the Board has had an outstanding, well-reasoned, uniformly accepted precedent decision, *Matter of S,* 5 I&N Dec. 409 (BIA, 1953), which sets forth the five criteria to be followed in the exercise of discretion in suspension cases. The Board decision ignores *Matter of S. supra,* altogether.

The criteria are:

(1) *Length of residence in United States:* 71 years, his whole life.

(2) *Family ties:* United States citizen spouse, four United States citizen children, six United States citizen brothers, two United States citizen sisters and eleven United States citizen grandchildren.

(3) *Possibility of obtaining a visa abroad:* None. Appellee is perpetually excludable from the United States under Section 212(a)(23) of the Act [8 U.S.C. 1182(a)(23)] for having been convicted of a marihuana offense.

(4) *The financial burden of having to go abroad to secure a visa:* The appellee's businesses would suffer extraordinarily by his absence.

(5) *Age and health:* The appellee is 71 years of age and in problematical health.

This inexplicable failure to follow *Matter of S, supra,* is yet another indication that the District Court's statement

about rumor and innuendo being the basis for the decision is a valid one.

This failure to follow established precedent without articulating the basis for the digression was *ipso facto* arbitrary and an abuse of discretion. *Marriott In-Flite Service Division* v. *NLRB,* 417 F. 2d 563 (1969), is on point and should be followed.

3. The District Court ordered a remand for the Board to weigh the evidence in the case, to exercise its discretion properly, and to determine the validity of the appellee's 1961 deportation hearing.

The Board's decision evaded — once again — the question of the 1961 deportation by stating that it did not consider this in arriving at a decision. The Board chose not to determine precisely what *was* the appellee's "length of residence" in the United States: 71 years or 20 years?

The District Court found this statement simply incredible, feeling that the question was directly relevant to the exercise of discretion. As the dissenting Board opinion states:

> "***[A]s should be evident, an applicant who has been in the United States continuously since 1910, when he was less than a year old, is in a far better posture than an alien who has been here only since 1961."

This consideration alone merits a remand. There is another distinct reasons for a remand, however, which the Court of Appeals did not address at all in its opinion: The question of eligibility for relief under Section 212(c) of the Act, 8 U.S.C. 1182(c)(1976). This section permits a waiver of excludability for aliens who "temporarily" proceeded abroad and "not under an order of deportation."

This relief only became available to the appellee on September 10, 1976 [*Matter of Silva,* 16 I&N Dec. 26 (BIA, 1976)]. The Court of Appeals has acceded in the proposition that such a waiver is available to the appellee [*Sierra-Reyes* v. *INS,* 585 F. 2d 762 (5th Cir., 1978); *Byus-Narvaez* v. *INS,* 601 F. 2d 879 (5th Cir., 1979)]. The appellee should have a hearing on the question of his application as a matter of constitutional right [*Vissian* v. *INS,* 548 F. 2d 325 (10th Cir., 1977)].

Clearly the question of whether or not the appellee departed from the United States "not under an order of deportation" in 1961 can only be determined by testing the legality of that deportation. For this purpose, if for no other, a remand must be ordered.

4. The Court of Appeals devoted nine pages of a ten-page opinion to an excellent and very sound decision on the issue of the availability of habeas corpus to the appellee. It has devoted only one page to a reversal of the District Court on the merits. It is respectfully submitted that the appellee deserves more: a modicum of consideration of the complex and critical issues of law described above.

As has been described above, the Board appears to have stretched every rule for an interpretation unfavorable to the appellee. The majority have ignored every single item of his evidence. The have grossly inflated the value of stale and pardoned convictions in order to deny him relief to the extent that grave suspicions were raised both on the Board itself and in the District Court that their findings were based not on legally sufficient evidence but on rumor and innuendo. Cf. *U.S. ex rel Accardi* v. *Shaughnessy,* 347 U.S. 260 (1954). Such an exercise is to be condemned as a failure to exercise discretion at all.

To state the case as boldly as possible, the appellee here is as close to being an United States citizen by birth as possible. He has spent his entire life here, and is as much a product of the United States as one born here. As was stated in *Rassano v. INS,* 492 F.2d 220, 225 (7th Cir., 1974):

> "* * * [W]e find here a six-month old baby, born in Italy, brought here by his parents to live a rather full lifetime and grow up to become a creature of the environment of the United States. He had no choice in the matter. He knows no other country. He has no relatives in Italy. They all live here and are citizens of this country. He does not speak the Italian language * * * He is now more than 60 years of age * * * [T]o affirm here would be to exile this petitioner to a foreign country for the remainder of his life. To invoke this extreme penalty under all the facts in this case relevant for consideration in our considered judgment goes too far."

See also, *U.S. ex rel Klonis v. Davis,* 13 F.2d 630 (2nd Cir., 1938).

This is an accurate description of the appellee's position. He is a prime example of the type of applicant whose case was contemplated by Congress in enacting this statute, the criteria for which were set forth by the Board in *Matter of S, supra,* which it saw fit to ignore here.

The suspension statute should be liberally construed to effectuate its ameliorative purpose, so that suspension of deportation will be granted to the alien for whom the hardship from deportation will be different and more severe than that suffered by the ordinary alien who is deported. *De Gallardo v. INS,* 624 F.2d 85, 87 (9th Cir.,

1980) says the suspension provisions are to be "generously construed to relieve aliens of harsh consequences, of unintended risks, and of unintended consequences * * *." See also *Kamheangpatiyooth v. INS,* 597 F.2d at 1256 (9th Cir., 1979).

One of the chief reasons for Congress' enactment of the suspension statute was a desire to protect immediate members of an alien's family from the hardship attending a deportation [*Tovar* v. *INS,* 612 F.2d 794 (3rd. Cir., 1980)]. Every year, the Immigration and Naturalization Service suspends the deportation of hundreds of aliens with a single United States citizen child, or an United States citizen spouse. A thorough review of the case law reveals *no other case* where the Government has decreed the deportation of a suspension applicant with the overwhelming equities, including a large United States citizen family, that the appellee has. See *Villena v. INS,* 622 F.2d 1352 (9th Cir., 1980), for the approval of suspension for an alien with only two United States citizen children and a residence of only 12 years.

The Board, at the very least, has violated the teaching of *Wadman v. INS,* 329 F.2d 812, (9th Cir., 1964), and has strictly and technically construed the suspension statute, which was intended to enable the Attorney General to ameliorate hardship and injustice.

The appellee here, at a minimum, deserves the right to be treated on the same footing as any other alien who makes a suspension application to the Board. He does not deserve to have a special set of rules, devised by a Board obsessed with denying him relief at all costs, applied to him alone, then jettisoned forever. To allow such a result would be a travesty of that fundamental fairness which this Court has always striven to accord any alien who petitions it for simple justice.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES of America ex rel.
Carlos MARCELLO,
Petitioner-Appellee,

v.

DISTRICT DIRECTOR OF the IMMIGRATION & NATURALIZATION SERVICE, NEW ORLEANS, LOUISIANA,
Respondent-Appellant.

No. 79-3219

United States Court of Appeals,
Fifth Circuit.

Jan. 22, 1981.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before THORNBERRY, GEE and REAVLEY, Circuit Judges.

GEE, Circuit Judge:

Carlos Marcello, a foreign national permanently resident in the United States, was first ordered deported in 1953, almost thirty years ago, on the basis of a 1938 marijuana conviction. The order was not executed until 1961, however, when it was apparently executed illegally; arguably Marcello was shanghaied to Guatemala without prior notice to him or his attorney by means of a Guatemalan birth certificate that the Immigration and Naturalization Service (INS) may have known was a forgery. About a month later, Marcello reentered the

United States without permission and, later in 1961, was the subject of another deportation order, this one based both on the 1938 conviction and the illegal entry after the apparently irregular 1961 deportation. The validity of neither the 1953 order nor of the 1961 order, insofar as it rests on the 1938 conviction, is contested here.

In 1972, Marcello filed an application for suspension of deportation, and in 1976 the Board of Immigration Appeals (Board) denied the application on two independent grounds: that Marcello had not shown the good moral character required for suspension by 8 U.S.C. § 1254(a) and that the Board did not choose to exercise its discretion to suspend deportation. The Board relied primarily on a 1968 conviction for assault and expressly stated that it did not consider Marcello's reentry after the 1961 deportation.

Marcello then filed this habeas action in federal district court. The court, after concluding that it had habeas jurisdiction, found that the Board both erred in finding that Marcello lacked good moral character and abused its discretion in denying suspension of deportation. The court vacated the Board's decision and remanded, 472 F.Supp. 1199 the cause for a determination of the validity of the 1961 deportation and a reassessment of Marcello's character. We reverse.

Although the facts of Marcello's case are relatively straightforward, we find the legal issues posed by astute counsel on both sides both doubtful and difficult. We treat them in what seems to us their logical order.

Is Habeas Available as a Remedy?

Commendably, as a matter of advocacy, the government's first contention goes for the jugular. It urges us to hold that the district court lacked jurisdiction to pass on

this matter at all. The contention is not without force, and the reasons why we must reject it require some explication.

In 1961, concerned by the lengthy delays in deportations occasioned by developing judicial precedent,[1] the Congress attempted to streamline these arrangements. It did so by enacting 8 U.S.C. § 1105a, which provides that the courts of appeals are to be the "sole" organs of review for final deportation orders and thus restricts resort to the district courts in such cases. The legislative purpose and background of this statute are extensively reviewed in *Foti v. Immigration Service,* 375 U.S. 217, 84 S.Ct. 306, 11 L.Ed.2d 281 (1963) and need not be further discussed here except in the one respect that is material.

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[1]Historically, an order for the deportation of an alien could be challenged in the courts solely by habeas corpus proceedings, available to the alien only after he had been taken into custody. In recent years, as a result of judicial decision, it has become possible for aliens to obtain judicial review of an order of deportation upon its issuance. An equally divided Supreme Court, in January 1954, affirmed per curiam a holding that deportation orders issued under the Immigration and Nationality Act of 1952 are reviewable in actions for declaratory judgment as well as by habeas corpus (*Brownell v. Rubinstein,* 346 U.S. 929 [74 S.Ct. 319, 98 L.Ed. 421] (1954)). Later, the Supreme Court held that deportation orders entered under the Immigration and Nationality Act of 1952 can be judicially reviewed in actions of declaratory and injunctive relief under section 10 of the Administrative Procedure Act *(Shaughnessy v. Pedreiro,* 349 U.S. 48 [75 S.Ct. 591, 99 L.Ed. 868] (1955)).

> There are several objections to the divergent methods of review. They lack uniformity. They are not mutually exclusive. They result in a delay in deporting an alien who should be deported. There is need for expedition, orderly venue, and the avoiding of repetitious court proceedings.

H.R.Rep.No.565, 87th Cong., 1st Sess. 5, 6 (1961) (testimony of the Assistant Attorney General heading the Criminal Division of the Justice Department before subcommittee of Judiciary Committee).

The sweep of section 1105a could not be a clean one because of Article I, section 9 of the Constitution, providing, among other things, that the Great Writ should not be suspended unless rebellion or invasion was in progress. This Congress recognized in section 1105a(a)(9) of the statute, which provides that an "alien held in custody pursuant to an order of deportation" can seek judicial relief via habeas corpus. The government urges upon us that since Marcello is not presently "held in custody," but merely subjected to reporting requirements and travel restrictions, habeas relief is not available to him.

It is true that in 1961, when the amending act was passed, "custody" for habeas purposes meant primarily physical detention by the government. Since most aliens subject to deportation orders are not physically detained, the habeas exception to exclusive review in the courts of appeals was then a minor one. Since 1961, however, the Supreme Court has expanded the concept of custody for habeas proceedings after conviction to encompass any significant restraint on liberty, including parole, *Jones v. Cunningham,* 371 U.S. 236, 83 S.Ct. 373, 9 L.Ed.2d 285 (1963), and release on one's own recognizance, *Hensley v. Municipal Court,* 411 U.S. 345, 93 S.Ct. 1571, 36 L.Ed.2d 294 (1973). If this broader notion of custody applies generally to habeas under section 1105a(a)(9), then the court below had jurisdiction,[2] habeas commencing in the district court remains an alternative vehicle of review in most deportation proceedings, and the judicial reform that Congress attempted to bring about by enacting section 1105a – elimination of the district court step in review of deportation orders – is in great part stultified.

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[2]*See* n.11. *infra,* and accompanying text.

Congressional Intent in Enacting Section 1105a

[1] As we have discussed briefly above, *see* note 1 and accompanying text, by 1961 Congress had become concerned at the proliferation and overlapping modes for review of deportation orders divined by the federal courts. The availability of so many options, it felt, enabled astute counsel effectively to nullify such orders by interposing interminable procedural delays. Cited at length in the legislative history were examples drawn from the history of the long campaign of the government to deport Marcello himself.[3] Today, twenty years later, that campaign continues.

The result of this congressional concern was the passage of 8 U.S.C. § 1105a. By that enactment, the Congress provided a single statutory method for review of final deportation order, abolishing all others, with one exception. We need not concern ourselves at length with the normal mode for review provided, since the time for Marcello to have pursued it is long past, and its provisions are not before us. Generally speaking, however, it sought to eliminate the inordinate delays that Congress perceived by providing for substantial – evidence review of the INS deportation proceeding in the courts of appeals, eliminating any initial resort to the district courts and requiring that such review be sought within six months of the final deportation order. *See Foti,* 375 U.S. at 224-36, 84 S.Ct. at 311-315. It is the exception to this method of review, however, that is before us in this case, Marcello having chosen to proceed under its provisions. It states: "any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings." 8 U.S.C. § 1105a(a)(9).

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[3] *See* Appendix A.

The legislative history of section 1105a leaves little doubt that by enacting it Congress meant to establish two mutually exclusive modes for reviewing deportation orders:[4] a general scheme of statutory review for cases where the alien was not "held in custody" and a provision for habeas review where he was. The Report of the House Committee provides on its first page that:

> The bill provides that with certain specified exceptions (made necessary by the unique subject matter of the bill), all the provisions of the act of December 29, 1950 (64 Stat. 1129, 68 Stat. 961; 5 U.S.C. 1031 et seq.), shall apply to and be the sole and exclusive procedure for judicial review of orders of deportation. In substance, an alien aggrieved by such an order may seek judicial review by filing a petition in the U.S. circuit court of appeals. The writ of habeas corpus is specifically reserved to an alien held in custody pursuant to an order of deportation.[5]

Also included in the report is the text of a letter from then Deputy Attorney General, now Justice, Bryon R. White to the chairman of the committee explaining, in response to his request, the Justice Department's view of the legislation and providing in pertinent part:

> Aliens seeking review of administrative orders should be given full and fair opportunity to do so, but the present possibilities of review pose undesirable obstacles to deportation of aliens who have been ordered deported and have had their day in court. An alien subject to a deporta-

[4]In the *Foti* case the Supreme Court held that the statutory phrase "final orders of deportation" includes denials of suspension of deportion such as we view here. 375 U.S. at 236, 84 S.Ct. at 315.

[5]H.R.Rep.No.565, 87th Cong., 1st Sess. 1 (1961).

tion order, having lost his case in a declaratory judgment or injunction proceeding may thereafter sue out a writ of habeas corpus when taken into custody. Moreover, as the law now stands, it is possible to seek relief by habeas corpus repeatedly.

The bill proposes to meet this problem by providing an exclusive method of review of deportation orders for aliens not in custody. This would be by petition for review in the appropriate court of appeals. The procedure is generally as prescribed by the act of December 29, 1950 (64 Stat. 1129; 68 Stat. 961; 5 U.S.C. 1031), relating to judicial review of orders of Federal agencies. The bill also provides "any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings." In order to meet the problem of repeated proceedings, no petition for review by the court of appeals or for habeas corpus may be entertained if the validity of the deportation order has been previously determined in any civil or criminal proceeding unless (1) the petition presents grounds which the court finds could not have been presented in the prior proceeding, or (2) the court finds that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order. Administrative findings of fact in deportation cases are made conclusive if supported by reasonable, substantial, and probative evidence.

Also in order to speed up the judicial review, the special statutory review proceeding provided in the bill must be instituted not later than 6

> months from the date of the final order of deportation. At the present time there is no time limitation applicable to judicial review.[6]

Finally, in the portion of the report entitled "Analysis of the Bill" it is asserted that "[t]he bill carefully preserves the writ of habeas corpus to an alien detained in custody pursuant to a deportation order."[7]

It is apparent, therefore, that Congress meant by enacting section 1105a to provide for two modes of review, one for those "held in custody" and one for those not so held. It remains for us to inquire what was intended by the phrase "held in custody." We think the statutory pattern and structure make plain that what was meant is actual, physical custody in a place of detention. Until that had occurred, we do not think the remedy of review by habeas corpus proceedings was meant to apply but rather that of review by direct appeal.[8]

Examining the pattern of the statute,[9] as well as legislative material such as the Justice Department letter quoted in part above, see text accompanying note 6, leaves little room for doubt that Congress attempted to severely limit the availability of habeas review. The basic pattern of

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[6] *Id.* at 3.

[7] *Id.* at 14.

[8] We do not suggest that Congress intended that release on bail or personal recognizance after the commencement of actual, physical custody would interfere with habeas proceedings; nor do we suggest that such a result would obtain today. *See Hensley v. Municipal Court,* 411 U.S. 345, 93 S.Ct. 1571, 36 L.Ed.2d 294 (1973); *Jones v. Cunningham,* 371 U.S. 236, 83 S.Ct. 373, 9 L.Ed.2d 285 (1963).

[9] What we say here concerning the statute's direct appeal remedy is not intended as a binding construction of those provisions of the statute, since nothing that turns on those provisions is squarely before us. Rather, we seek the congressional intent and plan.

review is meant to be by petition to the appellate court, not by resort to habeas in the district court.

Section (a)(7) of 8 U.S.C. § 1105a, separated from section (a)(9), which preserves the habeas remedy to those "held in custody" only by a housekeeping provision, provides:

> (7) nothing in this section shall be construed to require the Attorney General to defer deportation of an alien after the issuance of a deportation order because of the right of judicial review of the order granted by this section or to relieve any alien from compliance with subsection (d) and (e) of section 1252 of this title. Nothing contained in this section shall be construed to preclude the Attorney General from detaining or continuing to detain an alien or from taking him into custody pursuant to subsection (c) of section 1252 of this title at any time after the issuance of a deportation order[.]

Subsections (c), (d), and (e) of section 1252, referred to above, provide respectively for a six-month period following the order of deportation or of the reviewing court for deportation of the alien, with authorization to the Attorney General to provide places of detention for those taken into custody; for mandatory supervision of aliens against whom final orders of deportation have been outstanding for so much as six months; and for criminal penalties for those seeking to evade deportation.

Finally, subsection (c) of section 1105a provides:

(c) An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed

from the United States after the issuance of the order. Every petition for review or for habeas corpus shall state whether the validity of the order has been upheld in any prior judicial proceeding, and, if so, the nature and date thereof, and the court in which such proceeding took place. No petition for review or for habeas corpus shall be entertained if the validity of the order has been previously determined in any civil or criminal proceeding, unless the petition presents grounds which the court finds could not have been presented in such prior proceeding, or the court finds that the remedy provided by such prior proceeding was inadequate or ineffective to test the validity of the order.

[2] Thus, we view a congressional pattern for deportation proceedings that contemplates:

> First, a final administrative deportation order;
>
> Second, a six-month period thereafter during which review in the court of appeals may be sought and during which the Attorney General may seek to deport the alien, with or without taking him into physical custody;
>
> Third, mandatory and restrictive supervision of those aliens remaining here after ther six-months period; and
>
> Fourth, judicial review by means of habeas corpus proceedings for aliens held in custody.

Viewing this plan, it is at once plain that the Congress, when enacting section 1105a, did not see the mere existence of an outstanding deportation order against an alien as placing him in the status of "held in custody." Had it done so, a main procedural innovation of the enactment-eliminating resort to the district courts in the

majority of cases-would have been an entire futility from its outset, since habeas in the district court would have been immediately available to all persons ordered deported, without any further assertion of "custody" over them, and resort to the district court routinely had, doubtless, by the delay minded.

The Government Contention Here

Reasoning from the above premises, the government contends that habeas is not available to Marcello here, since at the time his petition was filed he was not in physical custody. As we noted at the outset, the argument has force, a force derived from its congruence with apparent congressional intent in crafting and enacting the statutory plan.

[3] At the time this petition was filed, when Marcello was subject only to the deportation order, we do not doubt that resort to the court of appeals was available to him as a remedy. Nor do we doubt that, having once so appealed, his right to obtain review in that mode would not have been disturbed by his being taken into "custody." If it were in the Attorney General's power to destroy the appellate remedy by moving under section 1105a(a)(7), quoted above, to seize an appellant, it would be of little value indeed. Nor, once such an appeal has been lodged, would the alien be well advised to dismiss it upon coming into custody and institute habeas proceedings in its stead. Such a course—indeed a mere failure to appeal at all within the six-months' period provided — would raise immediate questions of deliberate bypass of statutory remedies, and should the occurrence of such a bypass be determined, habeas relief would likely be held unavailable as well — except perhaps for matters excepted by section 1105a(a).[10]

Those "which the court finds could not have been presented in such prior proceeding, or the court finds that the remedy provided by

[4] Here, however, the converse has occurred; Marcello filed his habeas petition at a time when, arguably, he was merely subject to a deportation order and not "held in custody." Perhaps a timely motion to dismiss, timely acted upon, might have forestalled this present cause before "custody" attached. This did not take place, however; and if the Supreme Court's expanded concepts of custody apply here, then Marcello presently is and for a long time has been in that condition.[11] We can discern little, if any,

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such prior proceeding was inadequate or ineffective to test the validty of the order." 8 U.S.C. § 1105a(c).

In the analogous context of 28 U.S.C. § 2255, we have often observed that a deliberate by-pass of the provided remedy of a federal appeal generally forecloses raising by the extraordinary means of habeas issues that could have been asserted in the foregone appeal. *Buckelew v. United States,* 575 F.2d 515, 518-19 (5th Cir. 1978); 550 F.2d 244, 246-49 (5th Cir. 1977); *McKnight v. United States,* 507 F.2d 1034 (5th Cir. 1975); *Morris v. United States,* 503 F.2d 457 (5th Cir. 1974); *Larson v. United States,* 275 F.2d 673, 679 (5th Cir.), *cert denied,* 363 U.S. 849, 80 S.Ct. 1627, 4 L.Ed.2d 1732 (1960). We have specifically held under § 2255, moreover, that "habeas will not be permitted to substitute for an appeal when the choice to seek habeas relief is made to seize some legal or tactical advantage." *Sosa v. United States,* 550 F.2d at 248; *accord, Morris v. United States,* 503 F.2d at 458; *Larson v. United States,* 275 F.2d at 679-80. The quest for such a tactical advantage — an added stage of review with its resulting delays — will doubtless usually be apparent in such cases as this.

[11]We recognize that in *Cunningham* and *Hensley,* the parole and release cases discussed above in text, the release from (or absence of) physical custody occurred during the habeas proceeding, so that a holding that these events terminated custody would have aborted the ongoing habeas proceedings. The Court lays no special stress on this circumstances, however, and in *Hensley* the petitioner had in fact never been in physical custody at any time after the conviction as to which he sought the writ. The conditions of his custody, moreover, appear less stringent than those applied here to Marcello. *See* 411 U.S. at 348, 93 S. Ct. at 1573. Marcello is under supervised parole, which requires him to report quarterly to the INS and notify it whenever he intends to leave Louisiana for more than 48 hours. Hensley seems to have been subject to no reporting requirements except to appear when ordered to do so. *Id.*

practical difference between the condition of Marcello and that of Hensley, who was held by the Court to have been in custody for habeas purposes. *Hensley v. Municipal Court,* 411 U.S. 345, 93 S.Ct. 1571, 36 L.Ed.2d 294 (1973). We conclude that since Marcello is presently in custody, though perhaps he was not for section 1105a purposes when this habeas petition was filed, we have jurisdiction of his appeal.

[5] Next the government urges us to discern and apply to Marcello's attempt to obtain relief in this case pursuant to 28 U.S.C. § 2241, the exhaustion requirements that are applied in actions brought pursuant to sections 2254 (state criminal convictions) and 2255 (federal ones). Only when the alien has availed himself of the normal mode of appeal provided him by section 1105a, it is said, should the courts entertain a plea for the extraordinary relief of habeas corpus. There is force and reason in this contention as well; however, to apply it now would be to bar Marcello from any review whatever, the six-month period for an appeal having long passed. Absent a finding of deliberate bypass of the direct appeal,[12] we do not believe such an outcome just or appropriate.

[6] Finally, the government argues persuasively that Congress intended by section 1105a to restrict habeas review to the constitutional minima, both as to availability and as to scope of review. There can be no doubt that there exists a constitutional core of habeas corpus authority, derived from the Common Law, guarded by Article I, section 9, and proof against congressional or executive tampering save in the event of invasion or rebellion. The

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[12]The court below did not make such a finding. In the circumstances of this case, and in view of Marcello's long experience with the laws governing deportation and his demonstrated ability in evading them, we might almost do so as a matter of law. *See* Appendix A.

statutory enactments overlaying the Great Writ-28 U.S.C. §§ 2241, 2254, and 2255-are, the arguments runs, congressional additions to its scope that may be limited or withdrawn at the pleasure of the Congress so long as the constitutional core is not disturbed. This, according to the government, is what was done by section 1105a: a more than adequately statutory appellate remedy was provided, together with a highly restricted version of habeas-one embodying only the constitutionally viable.

We agree with the government that such a plan and purpose would be a rational and probably desirable one. The difficulty here is that there is little or no indication, either in the statute or the legislative history, that it was the *congressional* plan and purpose in enacting section 1105a. To the contrary, as we have noted above, these materials seem to indicate that the Congress contemplated alternative methods of obtaining review, one available to aliens not "held in custody" and the other to those who were. We see little logic and less fairness in laying it down that the scope of review available to an alien may be narrowed by the occurrence of an event quite beyond his control, the action of the Attorney General in taking him into custody. Rather than such an effect, what Congress intended, we think, was to abolish in as many cases as possible the district court step in direct appeals and the employment by the alien of *both* modes of review successively. Our conclusion in this line is reinforced by he simple language of section 1105(a)(9), providing that "judicial *review*" of the deportation order may be had in habeas corpus proceedings by an alien in custody.

Thus, it appears that the government's attacks on jurisdiction and propriety of review here must, perhaps unfortunately, fail.

The Merits

[7] Our standard of review of the order of the Board denying suspension of deportation, then, is the same as that on direct appeal of a final order of deportation. It is whether "reasonable, substantial, and probative evidence on the record considered as a whole" supports the order. 8 U.S.C. § 1105a(a)(4). That question is one of law as to which we review the district court's decision free of the trammels of the clearly erroneous standard. The district court concluded that substantial evidence did not support the order. We disagree.

In a majority opinion, reproduced in material part as Appendix B, the Board dismissed Marcello's application for suspension of deportation, both for failure to establish statutory eligibility and in the exercise of its discretion. It did so on the basis of numerous facts detailed therein, all of which are supported by substantial evidence in the record and most of which are not seriously disputed. Among these are a 1938 drug conviction, a 1930 state conviction for assault and robbery,[13] and a 1968 felony conviction for assault on a federal officer. In view of these matters, we cannot say that the Board's decision that Marcello failed to establish good moral character for the requisite ten year period is unsupported by substantial evidence. Nor can we conclude that the Board's discretion to deny suspension was abused, a ground independent of the statutory prerequisites. *United States ex rel. Hintopoulous v. Shaughnessy,* 353 U.S. 72, 77 S.Ct. 618, 1 L.Ed.2d 652 (1957).

[13] For which Marcello received a sentence of nine to fourteen years. Of this, he served four years and was pardoned the latter being a circumstance irrelevant for present purposes. *Cf. Qureshi v. I.N.S.,* 519 F.2d 1174 (5th Cir. 1975) (fact of conviction is all that is relevant under deportation statute; thus, fact that conviction resulted from plea of nolo contendere is irrelevant).

In vacating the order of the Board, the court below laid stress on the 1961 deportation and re-entry of Marcello, refusing to countenance the Board's statement in its opinion that it did not consider these in arriving at its decision. That court further found fault with the Board's failure to state expressly in its opinion that it had considered character affidavits filed by Marcello and indicated that it believed the Board may have relied "on rumor and innuendo." We are unable to adopt these objections to the Board's order.

We see reason to doubt the Board's statements that it disregarded the 1961 incidents. Well it might have, since whatever an irregular deportation may show about government behavior, it shows little or nothing about Marcello's moral character. As for the affidavits, there is no requirement that the Board set out expressly the evidence that it considered in arriving at its decisions; and we decline to indulge in any assumption that because no such list was given the Board failed to consider the evidence before it. Finally, the court gives no explanation for why it feels rumor and innuendo may have been improperly considered by the Board. We see little basis for such a conclusion. The evidence being sufficient to support its conclusions, we decline to assume that that the Board acted improperly. Although Marcello may indeed have been the subject of rumor in his career, it does not follow that the decision of the Board was based on any such thing.

The judgment of the district court is REVERSED and that of the Board is AFFIRMED.

APPENDIX A

In connection with hearings held by the Senate Select Committee on Improper Activities in the Labor or Management Field, the Department of Justice issued, on March 25, 1959, the following press release:

Department of Justice
Wednesday, March 25, 1959

For Immediate Release:

The Department of Justice made public today the following letter dealing with deportation proceedings against Carlos Marcello:

March 25, 1959

Hon. Sam J. Ervin, Jr.,
U.S. Senate.

Dear Senator Ervin: It has been called to my attention that yesterday at the hearing of the Senate Select Committee on Improper Activities in the Labor and Management Field you made inquiries concerning the deportation proceedings against Carlos Marcello. I thought you would be interested in knowing the steps the Department of Justice has taken to rid the country of this undesirable alien. Attached herewith is a summary of the chronology of the litigation involved in these proceedings.

You will notice that on six separate occasions Marcello has instituted various suits in the district courts of the United States raising issues incident to the deportation order. Each case has been contested vigorously. On several occasions, he has sought review in the court of appeals, and on three occasions has been to the Supreme Court of the United States. Although the deportation order has been successfully defended on all occasion, and the

Government has been successful on most of the other issues raised, it has been under court-imposed restraint from deporting Marcello during much of this time.

During periods when there was no court imposed restraint deportation has not been possible because of the lack of an Italian passport, without which deportation was not possible. In August 1955 when travel documentation was available and Marcello had been directed to surrender for deportation, the Italian consul at New Orleans revoked the passport on the day he was to be deported. Thereafter, further litigation was instituted and was decided favorably to the Government. After continuous negotiations the Italian authorities on October 31, 1956, issued another passport which was limited in time. However, on the day before its issuance, Marcello filed a new suit and obtained a temporary restraining order preventing deportation.

Another suit was instituted by Marcello to delay deportation and, in addition, he started proceedings in the Italian courts for a judgment declaring him not to be a citizen of Italy, as a result of which the Italian Foreign Office was enjoined from issuing any travel documents until that suit is terminated. Nevertheless, the Government has continued to exert every effort for the issuance of an Italian passport and I have personally participated in this effort.

At the present time the deportation order against Marcello is still outstanding. In his last effort to delay deportation, he applied for an administrative stay on the ground that he would suffer physical persecution if deported to Italy. When this was denied in the U.S. District Court for the District of Columbia, he sought review in the court of appeals. The latter court held that the Immigration Service had not given him adequate time to collect and present evidence in support of his claim that

he would be subject to persecution. He was given such an opportunity and on February 20, 1959, the Service denied the requested relief.

Although presently there is no pending litigation, deportation cannot be effected because no passport is available. If this obstacle is overcome there is no guarantee that deportation can be expeditiously effected. On the basis of past experience it is expected that Marcello will attempt other delaying tactics in the courts.

In connection with the delays often encountered in effecting deportation, I would like to call your attention to the fact that the administration for the past 5 years has sought legislation which would strengthen our immigration laws by limiting judicial review of deportation orders within reasonable bounds so as to avoid its repeated use solely as a delaying tactic. There is now pending before the Congress H.R.2807 which would carry out the administration's proposal.

It is highly desirable, in my opinion, that this legislation be passed. We have repeatedly called to the attention of the Congress the fact that under the present laws racketeers and other undesirables can frustrate deportation by repeated dilatory actions. It makes a mockery of the deportation process.

I urge the Congress to enact this much needed legislation at the earliest possible moment.

Sincerely,

William P. Rogers,
Attorney General

CHRONOLOGY OF LITIGATION IN DEPORTATION PROCEEDINGS AGAINST CARLOS MARCELLO

December 30, 1952: Deportation proceedings instituted.

February 20, 1953: Ordered deported by reason of narcotic law violations.

June 1, 1953: Appeal to Board of Immigration Appeals dismissed.

June 2, 1953: Taken into custody and filed a petition for writ of habeas corpus.

June 8, 1953: Petition dismissed by U.S. district court in New Orleans, La., which found deportation order valid (113 F.Supp.22).

May 6, 1954: Dismissal affirmed by Court of Appeals for the Fifth Circuit (212 F.2d 830).

May 31, 1955: Affirmed by Supreme Court (349 U.S. 302, 75 S.Ct. 757, 99 L.Ed. 1107), rehearing denied (350 U.S. 856, 76 S.Ct. 38, 100 L.Ed.761).

June 1955: Suit for declaratory judgment challenging deportation order and to restrain Government from deporting filed in U.S. District Court for the District of Columbia (No. 2763-55).

August 26, 1955: Last petition for habeas corpus dismissed, and bail pending appeal denied by both district court and Court of Appeals for the Fifth Circuit.

September 16, 1955: Mr. Justice Black ordered release on bail until deportation can be effectuated — upon condition he appear for deportation upon 3 days' notice.

October 10, 1955: Stipulation with Solicitor General providing for release upon administrative bail instead of judicial bail.

October 11, 1955: Justice Black vacated his order of September 16, 1955, and habeas corpus proceeding in Court of Appeals for the Fifth Circuit dismissed as moot.

October 19, 1955: Marcello released upon administrative bond, conditioned upon his production on 3 days' notice.

October 25, 1955: Declaratory judgment action in District of Columbia (No. 2763-55) dismissed, upon Government's motion for summary judgment.

October 25, 1955 to April 25, 1956: Government unable to deport because of lack of travel documents.

April 26, 1956: 6 months having expired subject direct to appear at local office of Immigration and Naturalization Service and notified he was enlarged on supervision as provided in section 242(d) of Immigration and Nationality Act of 1952. Administrative bond canceled.

April and May 1956: Subject objected to order of supervision, which limited his right to travel and contained no provision for 3 days' notice of deportation.

May 3, 1956: Immigration and Naturalization Service granted some relief with respect to travel limitation, but refused to assure 3 days' notice, which was contemplated only for period of administrative bail bond which had been canceled.

May 16, 1956: Marcello filed complaint in District Court for District of Columbia (No. 2046-56) requesting a judgment that Attorney General was violating the stipulation and interfering with petitioner's liberty in "gross." Also requested an injunction against the supervision order.

October 30, 1956: Filed motion for preliminary injunction against deportation except on 3 days' notice. District

Court issued such a restraining order.

October 31, 1956: Travel documents issued by Italian consul, which would have enabled Government to deport.

October 31, 1956: Marcello filed complaint in District Court for District of Columbia challenging validity of deportation order for third time (No. 4277-56).

November 1, 1956: Subject served with notice of intention to take him into custody and deport after expiration of 72 hours.

November 5, 1956: District court denied motion for preliminary injuncion in No. 4277 56.

November 5, 1956: Appeal from district court's order denying preliminary injunction (C.A.D.C. No. 13,595) and stay of deportation pending appeal granted.

December 7, 1956: District court in same case (No. 4277-56) granted Government's motion for summary judgment and subject appealed therefrom (C.A.D.C. No. 13,653).

January 2, 1957: In case 2046-56, which was filed May 16, 1956, district court granted Government's motion for summary judgment dismissing complaint to enjoin enforcement of supervision order. Subject again appealed (C.A.D.C. No. 13,655).

June 13, 1957: Two of the appeals (No. 13,595 and No. 13,653) decided in favor of the Government (245 F.2d 279).

June 14, 1957: In the remaining case on appeal (No. 13,655) Government moved for leave to file a copy of the order of supervision as amended pursuant to decision of Supreme Court in *United States v. Witkovich* (353 U.S.

194, 77 S.Ct. 779, 1 L.Ed.2d 765). Amendment left open only the issue of the necessity of a 3-day notice.

June 24, 1957: Subject moved that mandate in the cases already decided by the court of appeals (Nos. 13,595 and 13,653) be stayed, or in the alternative, that a stay of deportation be granted in the remaining case (No. 13,655) unless 3 days' notice of deportation be given.

August 1, 1957: Court of appeals denied motion for stay of mandates in Nos. 13,595 and 13,653 and in the remaining case challenging the supervision order (No. 13,655) remanded to the district court with directions to vacate its judgment and with directions to dismiss as moot the complaint as to the question of the validity of restrictions imposed by the prior order of deportation.

October 17, 1957: Subject filed a new suit for declaratory and injunctive relief against the Attorney General in the District Court for the District of Columbia charging in essence that he had applied for a stay of deportation under section 243(h) of the Immigration and Nationality Act on the ground that he would be subject to physical persecution if deported to Italy; and that the stay was denied because of bias and prejudice, and unfair hearings and the application of improper statutory standards.

October 17, 1957: Subject filed a new suit for declaratory and injunctive relief against the Attorney General in the District Court for the District of Columbia charging in essence that he had applied for a stay of deportation under section 243(h) of the Immigration and Nationality Act on the ground that he would be subject to physical persecution if deported to Italy; and that the stay was denied because of bias and prejudice, and unfair hearings and the application of improper statutory standards.

October 24, 1957: Subject filed in Supreme Court petition for certiorari, from last order.

December 16, 1957: Supreme Court denied certiorari.

March 25, 1958: The district court granted the Government's motion for summary judgment.

October 10, 1958: The court of appeals vacated the judgment below and remanded the case to the district court with directions to remand the case to the Service for further proceedings at which plaintiff shall be offered a reasonable period (in any event not less than 3 weeks) with which to gather and present further evidence in support of his application.

January 12, 1959: The special inquiry officer recommended denial of the application.

February 20, 1959: The regional commissioner, Richmond, denied the application.

November 23, 1956: Marcello filed a suit in the civil court of Rome, Italy, for a judgment declaring him to be not a citizen of Italy and to enjoin the Italian Government from issuing a travel document to him.

August 11, 1958: Hearing in civil court of Rome adjourned to October 25, 1958.

October 25, 1958: Hearing set for January 15, 1959, on Marcello's request for letters rogatory.

January 15, 1959: Hearing postponed to May 15, 1959.

December 20, 1960: Civil court of Rome ordered briefs within 30 days to explain necessity for taking interrogatories in United States.

March 9, 1961: Rome court denied motion for letters rogatory. (Appeal may be taken to the tribunal.)

April 4, 1961: Marcello deported to Guatemala.

April 5, 1961: Complaint in new action, No. 1035-61, filed in District Court, District of Columbia, for judgment declaring his deportation unconstitutional and for injunctive and other relief.

April 21, 1961: Three-judge court convened to decide constitutionality of deportation statute.

May 16, 1961: Three-judge court held that complaint presented only a claim of unconstitutionality of the result obtained by the use of the statute which was not attacked as unconstitutional. Marcello's motion for a preliminary and permanent injunction denied, three-judge court disolved and case remanded to single-judge district court for appropriate action on other issues.

May 19, 1961: District court granted Government's motion for summary judgment.

June 2, 1961: Marcello filed motion for reconsideration and to set aside judgment of May 19, 1961.

June 16, 1961: District court denied Marcello's motion of June 2, 1961.

April 13, 1961: Complaint filed in action No. 1126-61, District Court, District of Columbia, against Commissioner of Internal Revenue, Attorney General, and Commissioner of Immigration and Naturalization for a declaratory judgment and for injunctive relief to cancel tax assessments and to set aside tax liens.

May 10, 1961: Defendants filed motion to dismiss complaint.

May 25, 1961: Defendants' motion to dismiss granted and Marcello's action dismissed as moot.

June 2, 1961: Marcello having returned to the United States (subsequent to May 8, 1961) a complaint was filed against the district director at New Orleans and the officer in charge at Shreveport (Marcello as plaintiff) in the District Court, Western District of Louisiana, No. 8311, to enjoin defendants from detaining Marcello pending final decision of his pending suit in the District Court for the District of Columbia and from removing him from the State.

June 5, 1961: Complaint dismissed for lack of jurisdiction over the subject matter. (No affirmative showing by competent evidence that Marcello was then within the court's jurisdiction).

June 13, 1961: Marcello filed a motion to set aside and modify the court's findings and conclusions of June 5, 1961.

TYPICAL EXAMPLES OF ABUSE OF JUDICIAL PROCESS

The alien, Marcello (see chronology, supra) was ordered deported in 1953 on a narcotic charge. Since that time, the chronology of his judicial proceedings presents an unparalleled picture of legalistic jousting with the U.S. Government. He also was before the Supreme Court of the United States several times. He questioned not only the deportation procedures, but the constitutionality of the law. He is still unsuccessful but is still advancing appeals and requests through the various courts, wherever he can find a willing ear, hunting a forum which will grant him another stay or injunction. Marcello is an alien whose criminal domain has its headquarters in the vicinity of New Orleans, La. However, he is apparently not satisfied with the judicial remedies available to him there, but he has chosen to bring his multitudinous court actions in Italy

as well as against the Attorney General in the courts of the District of Columbia – obviously a maneuver to gain the delays resulting from the crowded calendars in the overworked courts of the District of Columbia and Italy. The committee has noted that Marcello's repetitious court proceedings are principally begun (with their accompanying requests for interim stays) just when the Government manages to obtain a travel document and is about to enforce his departure – many years after the order of deportation was entered.

APPENDIX B

In re: Carlos Marcello or Calogero Minacori

Application: Suspension of deportation

In a decision dated July 11, 1973, after a reopened hearing, the immigration judge denied the respondent's application for suspension of deportation under section 244(a)(2) of the Immigration and Nationality Act both for failure to establish statutory eligibility and in the exercise of his discretion. The respondent has appealed from that decision. The appeal will be dismissed.

The alien respondent was born in Tunis, Africa of Italian parents on February 6, 1910. He was brough to the United States while an infant, but he never became a citizen of this country.

In 1938, the respondent was convicted in a federal court for a violation of the Marihuana Tax Act, and he was sentenced to one year imprisonment. On June 1, 1953, the Board entered a final administrative order of deportation against the respondent under section 241(a)(11) of the Act on the basis of the respondent's 1938 marihuana conviction; the Board also denied the respondent's application for suspension of deportation in the exercise of discretion. *Matter of M—*, 5 I&N Dec. 261 (BIA 1953). This administrative order was affirmed by the Fifth Circuit Court of Appeals, *Marcello v. Ahrens,* 212 F.2d 830 (5th Cir. 1954), and by the United States Supreme Court, *Marcello v. Bonds,* 349 U.S. 302, 75 S.Ct. 757, 99 L.Ed. 1107 (1955), rehearing denied, 350 U.S. 856, 76 S.Ct. 38, 100 L.Ed. 761 (1955).

For a period of time thereafter, the Government was unable to effect the respondent's deportation. On April 4, 1961, however, the Government was able to deport the

respondent to Guatemala. Thereafter, in approximately 1961, the respondent reentered the United States without securing permission to do so from the Government.

New deportation proceedings were instituted against the respondent. On December 20, 1961, the Board entered an order finding the respondent deportable under section 241(a)(11) on the basis of the 1938 conviction, and also finding the respondent deportable under section 241(a)(1) by reason of excludability at entry under section 212(a)(17) for failure to secure permission to reapply. That order of deportation has never been executed.

On August 13, 1963, the respondent moved to reopen deportation proceedings to challenge the validity or his 1961 deportation. In a decision dated October 22, 1963, the Board denied that motion on the ground that it was premature, without prejudice to resubmission at a later date.

On December 9, 1970, the respondent again moved to reopen deportation proceedings for the purpose of establishing that his 1961 deportation to Guatemala was illegal. The board denied that motion on February 25, 1971, noting that the respondent was clearly deportable on the section 241(a)(11) charge, and would soon satisfy the physical presence requirement for suspension of deportation under section 244(a)(2). Therefore, the Board stated that it would be pointless to reopen for a time – consuming inquiry into a matter that would have no material bearing on the respondent's deportability and little on his eligibility for suspension of deportation. The respondent's petition for judicial review of the Board's 1971 order was dismissed as moot by the Fifth Circuit Court of Appeals. *Marcello* v. *INS,* 449 F.2d 349 (5 Cir. 1971).

On February 4, 1972, we granted the respondent's mo-

tion to reopen deportation proceedings for the purpose of allowing the respondent to apply for suspension of the deportation order under section 244(a)(2) of the Act. It is from the immigration judge's denial of this relief that the present appeal was taken.

Initially, counsel has again raised the issue of the legality of the 1961 deportation. We adhere to our earlier position, that this issue is not germane to either the respondent's deportability or his suspension application. The respondent clearly is deportable on the section 241(a)(11) charge regardless of the validity of the 1961 deportation. Since the respondent has been physically present in the United States for more than ten years since 1961, the legality of his deportation in that year is not material to his present application for suspension under section 244(a)(2).

Nevertheless, counsel contends that the 1961 deportation is relevant to the issue of discretion because (1) a second violation of the immigration laws for illegal entry in 1961 would be an adverse factor, and (2) and alien with uninterrupted physical presence since 1910 would be in a better position than an alien with uninterrupted physical presence only since 1961. The short answer to this contention is that we have not considered either of the foregoing factors as bearing on the respondent's suspension application. Our present decision is in no way based on either the manner of the respondent's 1961 entry or the fact that his continuous physical presence since 1910 was interrupted for about a month in 1961.

The respondent has the burden of proof with respect to his application for suspension of deportation, 8 C.F.R. 242.17(d). In order to establish eligibility for relief under section 244(a)(2), the respondent must show: (1) physical presente in the United States for a continuous period of

not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation; (2) good moral character for a period of at least ten years preceding his application; and (3) deportation would result in exceptional and extremely unusual hardship to himself or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence. In addition to establishing that he meets the foregoing statutory requisites, the respondent must also establish that he merits a favorable exercise of discretion. *See U.S. ex rel. Hintopoulous* v. *Shaughnessy,* 353 U.S. 72, 77 S.Ct. 618, 1 L.Ed.2d 652 (1957).

It is undisputed that the respondent has met the ten year continuous physical presence requirement.

With respect to the issue of good moral character, we have already mentioned the respondet's 1938 conviction which involved two transfers of bulk marihuana totaling 380 ounces. In addition, the respondent was convicted in 1930 for assault and robbery under Louisiana law and received a sentence of nine to fourteen years imprisonment. He actually served four years of his sentence and received a pardon in 1935.

In 1968, during the period for which good moral character is required, the respondent was convicted under 18 U.S.C. § 111 for assaulting an F.B.I. agent, a felony. The respondent was sentenced to two years imprisonment and a $5,000 fine. The sentence of imprisonment, however, was later reduced to six months with two years probation. The respondent actually served 150 days of his prison sentence. It also has been conceded by the respondent that during the years 1945-51 he derived his income from gambling.

Since the respondent served less than 180 days in prison for his 1968 conviction, he avoids the statutory bar to a finding of good moral character contained in section 101(f)(7) of the Act. Since the respondent has not been shown to have derived his income principally from gambling during the last ten years, he also avoids the preclusion contained in section 101(f)(4) of the Act. However, the fact that the respondent's conduct is not within the grounds enumerated by the statute does not prevent us from considering it in making an overall assessment of good moral character. See section 101(f), Immigration and Nationality Act.

It is also clear that conduct occurring prior to the period for which good moral character is required can be considered in determining whether the respondent has been a person of good moral character during that period. *Matter of Peralta,* 10 I&N Dec. 300 (BIA 1963); cf. *Yuen Jung* v. *Barber,* 184 F.2d 491 (9 Cir. 1950); *Inre Suey Chin,* 173 F.Supp. 510 (S.D.N.Y. 1959). Contrary to the position taken by counsel, the respondent's pardon for his 1930 conviction does not preclude us from considering the fact that the violation of law occurred in judging the respondent's moral character. Cf. *Matter of H—,* 6 I&N Dec. 619 (BIA; A.G. 1955); *In re Paoli,* 49 F.Supp. 128 (N.D. Cal. 1943); *In re Bookschnis,* 61 F.Supp. 751 (D.Ore. 1945); *Taylor* v. *United States Civil Service Commission,* 374 F.2d 466 (9 Cir. 1967).

The respondent's criminal record covers a span of 38 years, going back to 1930. During at least a portion of this time, the respondent's income was derived from gambling. The respondent's most recent conviction, for a felony, occurred within the ten—year period for which good moral character is required, an he was imprisoned for a period just short of that which would have precluded him from

establishing good moral character. On these facts we find no evidence of the type of character reformation that would warrant a finding of good moral character for the statutory period. Consequently, we conclude that the respondent has failed to meet the good moral character requirement of section 244(a)(2) of the Act.

The immigration judge also found that the respondent had failed to meet the "exceptional and extremely unusual hardship" requirement of section 244(a)(2). In light of our finding that the respondent lacks the requisite good moral character, we need not determine whether the respondent has met the hardship requirement.

Even if the respondent were able to establish statutory eligibility for suspension of deportation, we would still deny such relief in the exercise of discretion. There is no doubt that the respondent's deportation would result in some hardship to him and to his family. Nevertheless, we believe that the respondent's longstanding criminal record, his imprisonment, and his gambling activities, combined with his lack of character reformation, outweigh the hardship to the respondent and his family. The respondent has failed to establish that he merits a favorable exercise of discretion.

The respondent's application for suspension of deportation under section 244(a)(2) of the Act must be denied both for failure to establish statutory eligibility and in the exercise of discretion. The result reached by the immigration judge was correct. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 79-3219

D.C. Docket No. CA-76-957 "L"

UNITED STATES OF AMERICA
ex rel CARLOS MARCELLO,
Petitioner-Appellee,

versus

DISTRICT DIRECTOR OF THE
IMMIGRATION & NATURALIZATION
SERVICE, NEW ORLEANS, LOUISIANA,
Respondent-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

Before THORNBERRY, GEE and REAVLEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed and that of the Board affirmed.

January 22, 1981

APPENDIX C

No. 79-3219

UNITED STATES OF AMERICA
ex rel CARLOS MARCELLO,
Petitioner-Appellee,

versus

DISTRICT DIRECTOR OF THE
IMMIGRATION & NATURALIZATION
SERVICE, NEW ORLEANS, LOUISIANA,
Respondent-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion January 22, 1981, 5 Cir., 198__, ____ F.2d __).
(March 13, 1981)

Before THORNBERRY, GEE and REAVLEY, Circuit Judges.

PER CURIAM:

(✔) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

S/Thomas Gibbs Jr.
United States Circuit Judge

APPENDIX D

UNITED STATES of America ex rel.
Carlos MARCELLO
v.
DISTRICT DIRECTOR OF the IMMIGRATION & NATURALIZATION SERVICE, NEW ORLEANS, LOUISIANA.

Civ. A. No. 76-957.

United States District Court,
E.D. Louisiana.

July 13, 1979.

Jack Wasserman, Wasserman, Orlow, Ginsburg & Rubin, Washington, D.C., Virgil M. Wheeler, Jr., New Orleans, La., for plaintiff.

John P. Volz, U.S. Atty., Eastern District of Louisiana, New Orleans, La., for defendant.

OPINION AND ORDER

JACK M. GORDON, District Judge.

This is a petition for Habeas Corpus review of a January 20, 1976, decision by the Board of Immigration Appeals ("Board"), denying to the petitioner, Carlos Marcello, relief from a 1961 order of deportation in the form of suspension of deportation. The Board denied relief for the reasons, first, that petitioner was statutorily ineligible for failure to show good moral character in the ten years preceding application and second, that alternatively the Board would deny relief as a matter of discretion. Since petitioner is presently under an order of super-

vised parole pursuant to 8 U.S.C. § 1252(d), this Court has already held that he is "in custody" so as to entitle him to Habeas Corpus review of the Board's decision under 8 U.S.C. § 1105a(a)(9). See, Memorandum and Order dated June 11, 1976. In a subsequent hearing held January 3, 1979, after thorough briefing by counsel, this Court also held that the scope of review under 8 U.S.C. § 1105a(a)(9) was identical to that of direct review by the Court of Appeals in that both constitutional and nonconstitutional issues were reviewable, but that the review was limited to the administrative record, and therefore, there could be no evidentiary hearing before this Court.[1]

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[1]Voluminous briefs had been filed by both the petitioner and by the government prior to oral argument on January 3, 1979. The government's main contention was that Habeas Corpus review, if allowable at all under U.S.C. § 1105a, was limited to review of constitutional issues. Petitioner contended that Habeas Corpus review entitled him to an evidentiary hearing, with additional fact-finding by this Court. In reaching its conclusions of January 3, 1979, the Court relied on the following authorities: First, the legislative history of 8 U.S.C. § 1105a, including § 1105a(a)(9), found at 1961 U.S. Code Cong. & Admin.News, pp. 2950, 2966-2977. Second, *Developments in the Law: Federal Habeas Corpus,* 83 Har.L.Rev. 1038, at 1240-1248 (1970). And finally, the combined effect effect of the following cases, construing or implementing the 1961 amendments to the immigration and Naturalization Act, *Foti v. Immigration &Naturalization Service,* 375 U.S. 217, 84 S.Ct. 306, 11 L.Ed.2d 281 (1963); *U.S. v. Pereira,* 574 F.2d 103 (2d Cir. 1978); *U.S. ex rel. Barbour v. I.N.S.,* 491 F.2d 573 (5th Cir. 1974), cert. den. 419 U.S. 873, 95 S.Ct. 135; *Aalund v. Marshall,* 461 F.2d 710 (5th Cir. 1972), aff'ing 323 F.Supp. 1380; *U.S. v. Gonzales-Parra,* 438 F.2d 694 (5th Cir. 1971); *Pilapil v. I.N.S.,* 424 F.2d 6 (10th Cir. 1970), cert. den. 400 U.S. 908 91 S.Ct. 152; *Gagliano v. I.N.S.,* 353 F.2d 922 (2d Cir. 1965); *Russo v. U.S. Immigration Commissioner,* 342 F.2d 42 (5th Cir. 1965); *U.S. ex rel. Parco v. Morris,* 426 F.Supp. 976 (E.D. Pa 1977); *Hon Keung Kung v. District Director I.N.S.,* 356 F.Supp. 571 (E.D.Mo.1973); *U.S. ex rel. Ling Shing v. Esperdy,* 305 F.Supp. 1106 (S.D.N.Y. 1969); *Application of Argyros,* 245 F.Supp. 190 (S.D.N.Y. 1965).

The merits of this appeal in Habeas Corpus were then briefed, and oral argument had, on April 25, 1979. At that time the Court orally stated to counsel for both parties, in open court, the tentative conclusions which it had reached regarding disposition of this matter. Those conclusions were reached after a thorough review of the record, as well as the many briefs filed by counsel. After informing the parties of its tentative conclusions, the Court invited counsel to file final briefs on the merits, addressing those conclusions which counsel might feel were in error, before the Court issued its written reasons for ruling. Final briefing occurred on May 18, 1979, and the matter was taken under submission.

After reviewing the comments of counsel on its tentative conclusions, the Court is not convinced that those conclusions were in error. Therefore, in acordance with the analysis presented orally on April 25, 1979, the Court now reduces its findings to writing.

Petitioner was originally ordered deported in 1953 as a result of a 1938 marijuana conviction. In 1961 the government succeeded in deporting petitioner to Guatemala, from which he subsequently reentered the United States without authority. A second deportation order was issued in 1961, based on the illegal reentry as well as the 1938 drug conviction. Petitioner's main contention is that the 1961 deportation was illegally carried out by the government, thus rendering the 1961 deportation order invalid. The Board failed to consider this argument in its decision of January 20, 1976. Petitioner contends that this was error because, had the Board voided the 1961 incident, petitioner could have been considered for suspension relief as one with permanent residence from 1910 (when he entered this country), rather than only from 1961, and thus have been more likely to obtain relief. Although it appears that

the Board's ultimate denial of relief to petitioner was based on the very lone term record he sought to have them review, the peculiar facts surrounding the history of this case require thorough ventilation in order to prevent the Board's latest decision concerning petitioner from sweeping under the rug aliegations of government misconduct of the worst sort.

HISTORY

Petitioner was born in Tunis, Africa, on February 6, 1910, of Italian parents. At the age of 8 months, on October 7, 1910, he was lawfully admitted to the United States for permanent residence. He is married to an American citizen, has four American-born children, as well as citizen grandchildren, brothers and sisters.

In 1953, petitioner was ordered deported under 8 U.S.C. § 1251(a)(11) as a native of Tunis, Africa, who had been convicted in 1938 of a marijuana violation under 26 U.S.C. § 2591. This deportation order was affirmed in *Marcello v. Bonds,* 349 U.S. 302, 75 S.Ct. 757 99 L.Ed. 1107 (1954). However, it was not executed until 1961.

In 1961, petitioner was deported to Guatemala on the basis of a Guatemalan birth certificate issued in the name of Calogers Minacore. Petitioner, Carlos Marcello, is also known as Calagore Minacore. Using this Guatemalan birth certificate, the Immigration Service obtained from the Guatemalan government an entry permit for petitioner on March 15, 1961. The permit described petitioner as a citizen of Guatemala. Petitioner alleges that with this document, the Immigration Commissioner deported him on April 4, 1961 in less than one hour after he reported to the District Director pursuant to the terms of his supervised parole. Just prior to actual departure, petitioner was

served with a warrant of deportation and a written notice of the designation of Guatemala as his place of deportation. Petitioner also alleges that copies of these documents were never served on his attorney of record in the Immigration proceedings, Mr. Jack Wasserman. Petitioner reentered the United States in May, 1961, and on June 5, 1961, a second deportation proceeding was initiated which resulted in a second order of deportation based on illegal reentry into the United States, as well as on the 1938 drug conviction.

Petitioner does not contest that he is deportable on the 1938 marijuana conviction, or that in April, 1961, there existed a valid outstanding 1953 order of deportation to support actually deporting him. However, he does allege that the 1961 deportation was fatally defective for several reasons, and that therefore, there was no illegal reentry such as to support the 1961 order of deportation. Specifically, petitioner contends that first, the Guatemalan birth certificate was a forgery, and the United States goverment *knew* it was a forgery and a false document when the Immigration Service used it to obtain the entry permit from Guatemala; second, that the failure to give the required notice to both petitioner and his attorney violated both his right to due process and his right to counsel, as provided for in 8 U.S.C. § 1252(b). See, *Mendez v. I.N.S.*, 563 F.2d 956 (9th Cir. 1977). Indeed, petitioner has been trying since 1961 to get either an administrative or a judicial determination of the validity of his 1961 deportation, as based on these arguments, but has been effectively thwarted at every turn by almost fifteen years of judicial and administrative "side-stepping" of the issue. The Court will now relate that history.

The day after petitioner was removed to Guatemala, his attorney filed suit on his behalf in the United States

District Court for the District of Columbia seeking a declaration that the deportation was illegal, and permission to reenter the United States. On cross-motions for summary judgment, the district court entered written reasons for the judgment which stated a finding that the deportation was legal. However, by the time the reasons were issued, petitioner had already reentered the United States, and a criminal prosecution for illegal reentry had begun. Therefore, on appeal, the District of Columbia Circuit reversed the district court, and vacated the judgment, ordering the complaint be dismissed for the reasons, first, that the request for permission to reenter was moot since petitioner was already back in the country, and second, that the declaration that the deportation was legal should never have been made by the district court, since that factual determination would be tried by a jury in the pending criminal proceeding. *Marcello v. Kennedy,* 114 U.S.App. D.C. 147, 312 F.2d 874 (1962), cert. den., 373 U.S. 933, 83 S.Ct. 1536, 10 L.Ed.2d 692.

Meanwhile, on July 11, 1961, petitioner was ordered deported on charges of illegal reentry, 8 U.S.C. 1182(a)(17), and marijuana violations, 8 U.S.C. § 1251(a)(11). Petitioner appealed that order to the Board of Immigration Appeals, seeking to have the order set aside and the case remanded, or that voluntary departure be granted. On December 20, 1961, the Board issued an opinion denying the requested relief for the following reasons.

First, the Board noted that the Special Inquiry Officer, who had issued the 1961 deportation order, had refused to hear any evidence on the possible illegality of the deportation, stating that the district court decision in *Marcello v. Kennedy* (reported at 194 F.Supp. 750) was res judicata.

The Board affirmed this ruling, not on the ground of res judicata, but under the principle of collateral estoppel.[2]

The district court had stated that ". . . the deportation has been in accordance with statute and is not tainted with any illegality." (194 F.Supp. at 753). Concluding that the same arguments for illegality were being raised in the appeal from the deportation order, the Board stated at p. A-5 of its decision:

> . . .We hold that the Court's decision that the deportation was in accordance with the statute and was not tainted with any illegality must be taken as conclusively established in this proceeding *so long as that judgment remains unmodified.* . . However, it the Court's decision should be reversed, the respondent may file a motion for reconsideration or reopening of this deportation proceeding. (emphasis supplied)

The Board then went on to deny relief in the form of voluntary departure because, due to the 1961 departure to Guatemala, petitioner could not establish continuous physical presence in the United States for ten years prior to his request and thus, was statutorily ineligible. See, p. A8 of the December 20, 1961, decision.[3]

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[2]The Board stated at p. A-4 of its decision:

> . . . Hence, the question of whether the respondent is precluded from offering evidence to show that the deportation to Guatemala was illegal depends on the doctrine of collateral estoppel by judgment and not on the doctrine of res judicata.

[3]It is important to note that at p. A-5 of that decision, the Board also stated that even if the 1961 deportation were ultimately proved invalid, petitioner was still deportable on the 1938 marijuana conviction. Petitioner does not contest this analysis, but points out that if the deportation had been held invalid at that time, he would have been statutorily eligible for relief.

Subsequent to the Board's 1961 decision, of course, *Marcello v. Kennedy* was reversed, and the judgment upon which the Board had relied for collateral estoppel was vacated [114 U.S.App.D.C. 147, 312 F.2d 874 (1962), cert den., 373 U.S. 933, 83 S.Ct. 1536, 10 L.Ed.2d 692 (1963)]. Pursuant to the Board's 1961 representations that it would entertain a motion to reconsider or reopen in this event, petitioner did so move in 1963. However, the criminal prosecution for illegal reentry was still ongoing at that time, so on October 22, 1963, the Board denied the motion to reopen ". . . solely on the ground that it is prematurely filed but without prejudice to later resubmission." At pp. B-2 and B-3 of that decision the Board acknowledged the validity of the 1961 deportation order did not depend on the outcome of the criminal proceeding, but that the Board felt it might prejudice petitioner in his criminal defense if he were questioned in the deportation proceeding about his deportation and reentry. Such concern was not, however, felt by the petitioner.

The criminal indictment for illegal reentry which so concerned the Board was dismissed on April 28, 1965. On June 18, 1970, petitioner was reindicted, but that charge was also dismissed on October 30, 1970. On December 9, 1970, petitioner again moved to reopen the deportation proceeding on the ground that the 1961 deportation was invalid. In that motion, he wished to be regarded as never having left the United States, so that he could apply for suspension of deportation under 8 U.S.C. § 1254(a)(2), which required ten years' continuous physical presence in the United States prior to application.

In ruling on this 1970 motion, the Board noted that in 1968 petitioner had been convicted under 18 U.S.C. § 111 for assaulting an F.B..I. agent. He had been sentenced to two years' imprisonment and a $5,000.00 fine, but that

sentence was later reduced to six months in prison with two years' probation. At the time of the motion to reopen, petitioner was serving this reduced sentence. Counsel for petitioner represented to the Board that he expected petitioner to be released on March 12 1971, after serving 148 days of his sentence. However, the Board noted that if for any reason petitioner was not released after 148 days, but was forced to serve his entire sentence, he would be statutorily ineligible for suspension of deportation under 8 U.S.C. §§ 1101(f)(7), 1254(a)(2), and 1254(e). See, Board decision of February 25, 1971. The Board then went on to state at p. C-3 of its decision that:

> . . . Respondent desires to reopen proceedings so that he can prove he was illegally deported. Respondent is deportable under the 1953 order of deportation even if the 1961 deportation were invalid.

From here, the Board reasoned, also at p. C-3:

> Thus, since respondent is deportable, either under the 1961 order or the 1953, it would be a useless act to reopen proceedings to permit him to apply for relief for which he has not yet established his eligibility. (referring to petitioner's prison term)

Therefore, the Board once again denied petitioner's motion to reopen ". . . solely on the ground that it was prematurely filed."

It is interesting to note that in the quoted language from the Board's February 25, 1971, decision, the Board expressed the opinion that were the petitioner's 1961 deportation proven invalid, then petitioner would be deportable, *not* under the alternative ground of the 1961 order, but rather under the 1953 order, presumably, reinstated

under 8 U.S.C. § 1252(f). This analysis appears to be correct to this Court as well. While the Government contends in the present proceeding that, were the 1961 deportation set aside, the 1961 order would remain on the basis of the marijuana charge, and while the petitioner contends herein that invalidating the 1961 deportation not only avoids the 1961 order in toto, but leaves *no* valid order outstanding, neither party has been able to supply the Court with *any* legal authority for either contention. Indeed, at the oral argument on April 25, 1979, counsel for both parties admitted that there is no law on this issue, and the Court has been unable to find any. However, the Court feels that the Board's analysis of February 25, 1971, is logically correct. If, in April, 1961, petitioner had been given sufficient notice to contest the deportation prior to actual physical removal, and if, assuming his allegations concerning the falsity of the Guatemalan birth certificate were correct, and his attack successful, then there would have been no physical removal, or deportation, and the 1953 order would have remained outstanding, valid, and enforceable.

The only arguable legal authority for the Government's proposition that the legality of the 1961 deportation need never be decided, either by the Board or by a court, is the 1971 per curiam decision by the Fifth Circuit in *Marcello v. I.N.S.*, 449 F.2d 349. That decision dismissed as moot petitioner's appeal of the Board's February 25, 1971, denial of his motion to reopen. The Fifth Circuit noted that an assumption by the Board that the 1961 deportation was valid had prevented their finding the necessary ten years' continuous physical presence for suspension relief, but that the validity of the deportation was moot on appeal because, by the time the case had reached the Fifth Circuit, the ten years had passed, and relief could no

longer be denied on that ground. See, 449 F.2d at 350.[4] What the Fifth Circuit did not note was that the Board's 1971 decision was not based so much on the ten years' physical presence requirement, but rather, on the potential effect of petitioner's prison term. In any event, on February 4, 1972, petitioner for the fourth time moved to reopen his deportation proceedings to contest the validity of his 1961 deportation. For the fourth time the Board refused to consider the issue, and denied petitioner suspension of deportation by decision of January 20, 1976. It is that decision which is presently before this Court on Habeas Corpus appeal.

DISCUSSION

[1] As a result of the 1961 order of deportation, petitioner was placed on supervised parole under 8 U.S.C. § 1252(d) in 1962. That order of supervision constitutes the custody from which derives petitioner's right to Habeas Corpus review, 8 U.S.C. § 1105(a)(9); *Developments in the Law: Federal Habeas Corpus,* 83 Har.L.Rev. 1038, 1238 (1970).

On February 4, 1972, the Board granted petitioner's petitioner's motion to reopen solely for the purpose of allowing him to apply for suspension of deportation. The Board's prior concern in 1971, i.e., that petitioner might be found statutorily ineligible for such relief as a result of his prison term, proved unfounded, as petitioner only

[4]The government argues at p. 2 of its May 9, 1979, brief that this decision means that the issue of the validity of the 1961 deportation order is moot insofar as it relates to any aspect of an application for suspension of deportation. A reading of the one-page decision clearly reveals the holding to be very narrow, i.e., that the issue is moot *only* with respect to petitioner's ability to meet the requirement of ten years' physical presence

served 150 days of his 1968 sentence and 180 days were required under § 101(f)(7) of the Immigration Act to bar suspension. By 1972, petitioner had also met the ten years' continuous presence requirement, and the 1961 deportation was no longer germane to that issue. However, the Board still refused to consider the validity of that deportation for any reason.

Petitioner contended that by having the 1961 deportation and alleged illegal reentry on his record, first, it would be an adverse factor bearing on the exercise of any discretion by the Board in his favor, and second, an alien with uninterrupted physical presence since 1910 would be in a much better position to obtain suspension of deportation than one with physical presence only since 1961. The Board maintained, however, that such alleged relevancy did not exist because ". . . Our present decision is in no way based on either the manner of respondent's 1961 entry or the fact that his continuous physical presence since 1910 was interrupted for about a month in 1961."

The Board then went on to find that petitioner was statutorily ineligible for suspension of deportation because he failed to meet the required showing of good moral character. In so finding, the Board cited the 1938 marijuana conviction, as well as a 1930 assault and robbery conviction for which petitioner actually served four years in prison, but for which he was pardoned in 1935. The Board also cited petitioner's receipt of income from gambling between 1945 and 1951. The Immigration Act, however, requires only a showing of good moral character for "at least ten years preceding application." In that regard, the Board felt that petitioner's having served 150 days in prison for his 1968 assault was so perilously close to the statutory bar of 180 days as to negate a finding of good moral character even within the preceding ten years.

Therefore, the Board specifically did not address the third requirement for suspension, i.e., that petitioner show exceptional or extremely unusual hardship, either to himself or to citizen family members, if he were to be deported. In the alternative, the Board denied suspension relief as a matter of discretion. Thus, the two issues before the Court are, first, whether petitioner has shown the requisite good moral character, and second, whether the Board abused its discretion in denying relief.[5]

[2] Petitioner contends: first, that the Board erred by once again refusing to consider the validity of the 1961 deportation; second, that he was effectively denied his right to oral argument under 8 C.F.R. 3.1(e) since two members of the three-man majority in the 1976 decision did not hear the oral argument; third, that the Board erred in finding statutory ineligibility by relying on stale and pardoned convictions, as well as the 1968 sentence, contrary to the Board's own guidelines; and, fourth, that the Board erred in denying relief as a matter of discretion when the record did not contain substantial evidence t support such a denial.

With respect to petitioner's first contention, the Court feels that the validity of petitioner's 1961 deportation is a crucial issue in this appeal, and one which should not be cleverly avoided by yet another court. The allegations which petitioner is making about the integrity of the

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[5]At p. 5 of the government's May 9, 1979, brief, it is argued that the Court has incorrectly assessed the two issues before it. This is so says the government because the Board also found petitioner statutorily ineligible for failure to show undue hardship. However, at pp. 5-6 of the January 20, 1976, opinion the Board states:

> In light of our finding that the respondent lacks the requisite good moral character, we need not determine whether the respondent has met the hardship requirement.

United States government and its Immigration Service raise serious ethical issues which should not even appear to be the beneficiaries of a judicial or administrative "cover-up." Furthermore, to so avoid the issue allows the possibility that "bad cases make bad law," and that this case might some day be used to violate the rights of one not so notorious a public figure as petitioner.

Petitioner has submitted to this Court various documents which tend effectively to show that a false Guatemalan birth certificate was knowingly used by the Immigration Service to fraudulently obtain a permit of entry for petitioner from the Guatemalan government. For the Government to argue here in brief that petitioner has no standing to complain of this activity because it was Guatemala which was defrauded, and not petitioner, is callous disregard for ethical standards of the worst sort. Furthermore, if petitioner can prove that neither he nor his counsel were given the appropriate notice of deportation, but that he was, instead, literally kidnapped and removed from the United States without due process and without his right to counsel, then the case would fall squarely within the holding of *Mendez v. I.N.S.*, 563 F.2d 956 (9th Cir. 1977).

In *Mendez,* the alien was a native of Mexico who was ordered deported under 8 U.S.C. § 1251(a)(4) for conviction of burglary. Mendez was summoned to appear for deportation on May 15, 1975, and was deported the same day, without notice to his counsel and without any opportunity to contact his counsel. On July 28, 1975, his attorney filed a motion to reconsider and for permission to reenter on the ground that prior to the deportation, Mendez' conviction for burglary had been vacated. The motion was denied for lack of jurisdiction. Mendez appealed, contending that the failure to notify his attorney

of the order to report for deportation, as required by published regulations, had deprived him of his right to judicial appeal and to administrative procedures which could have resulted in the vacating of his order of deportation. The Government challenged the jurisdiction of the Ninth Circuit to entertain Mendez' appeal by citing 8 U.S.C. § 1105a(c) which provides that an alien cannot challenge an order of deportation if he has departed from the United States after the issuance of the order.

The Ninth Circuit rejected the Government's position, holding that "departed" under 8 U.S.C. § 1105a(c) meant "legally departed," and that the illegal removal of an alien from this country cannot be used as a bar to review of the order under which he was removed. The court further held, at 563 F.2d 959:

> Here, failure to notify appellant's counsel amounts not only to a vilation of 8 C.F.R. 292.5(a), but also of appellant's right to counsel as provided in 8 U.S.C. 1252(b). We order the [I.N.S.] to admit appellant into the United States, granting appellant the same status he held prior to the May 15, 1975 deportation. This will permit appellant to pursue any administrative and judicial remedies to which he is lawfully entitled.

In *Mendez,* the failure of I.N.S. to notify counsel prevented Mendez from contesting the order of deportation on the ground that his burglary conviction had been vacated. In the present case, the failure to notify petitioner's counsel of the proposed removal prevented petitioner from stopping the removal by showing the Guatemalan birth certificate to be false. In *Mendez,* the alien at least knew he was reporting for deportation on May 125, 1975. Here, however, petitioner ws merely mak-

ing a routine report under the terms of his parole when he was served with a deportation notice and whisked away. Furthermore, the hint of Government fraud in the present case exacerbates the violation of petitioner's rights which resulted in his being counter-deported from Guatemala (See, *Marcello v. Kennedy,* supra, at 194 F.Supp. 752), and subjected to two criminal prosecutions for illegal reentry. Just as the *Mendez* court held that the illegal removal of an alien cannot bar review of his deportation order, the allegedly illegal removal of petitioner should never have been allowed to constitute the basis for a finding of statutory ineligibility for suspension of deportation without a thorough ventilation of the facts surrounding that removal. To blithely state that the issue becomes moot because, by using it, ten years of petitioner's life eventually pass, is to ignore the fact that if indeed his rights have been violated, that violation has caused him to be subject to two criminal prosecutions he would not otherwise have been exposed to. If petitioner's rights have been violated as he alleges, then under *Mendez* he is entitled to have his day in court on this issue.[6]

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[6]The issue of the validity, or illegality, of the 1961 deportation will not remain "moot" much longer. At the hearing on April 25, 1979, the Court stated to counsel that were petitioner to move the Board to reopen deportation proceedings to apply for a waiver of his drug conviction under 8 U.S.C. § *1182(c), as interpreted in Francis v. I.N.S.,* 532 F.2d 268 (2d Cir. 1976), and employed by the Board in *Matter of Silva,* Interim Decision 2532 (BIA 1976), then a final determination of this issue would be virtually inescapable for the Board. Contrary to the Government's apparent misunderstanding of the Court's April 25, 1979, remarks the Court expressed an inclination, in order to avoid further delay, *not* to order the Board to entertain a motion for *Francis* relief, but to order petitioner to *file* such a motion contemporaneously with disposition of the present matter. Since the Court has received a copy of a letter of May 7, 1979, from petitioner's counsel to the District Director of the Immigration and Naturalization Service, including an application for *Francis* relief, the contemplated order is now unnecessary.

Insofar as *Mendez* may relate to the precise issue of whether or not the Board erred in its finding of a lack of good moral character, the Court is of the opinion that, although the Board stated that it was not going to consider the 1961 departure in assessing petitioner's request for relief, it is difficult if not impossible for this Court to perceive how a decision on that issue could not be affected in large measure by a thorough exposition of the details surrounding petitioner's removal from the United States. The Board itself, in its earlier decisions, indicated to petitioner that the issue would one day be decided, and that should the 1961 order fall, the 1953 order would prevail.

Furthermore, in making the determination that petitioner lacked good moral character, this case bears a striking resemblance to that of *Rassano v. I.N.S.*, 492 F.2d 220 (7th Cir. 1974). In *Rassano* the Seventh Circuit reversed a denial of discretionary relief based on stale convictions and rumors of underground criminal connections. The factual details of *Rassano* are startingly similar to the instant case, where petitioner has been the subject of many such rumors in the New Orleans area alone. The appearance that this case has not been decided on the basis of factors usually relied on by the Board (see, dissent filed January 20, 1976), but rather on rumor and innuendo, can only be dispelled, in this Court's mind, by a remand for additional fact-finding and a determination of the validity of petitioner's 1961 deportation, with an express statement by the Board as to its assessment of the numerous character affidavits on behalf of petitioner, which affidavits were submitted to the Board, but not commented on by them.

CONCLUSION

For the foregoing reasons, the Court finds that the Board committed error in its finding that petitioner lacked the requisite good moral character for a suspension of deportation under § 244(a)(2) of the Immigration Act, and that it abused its discretion in denying the requested relief.[7] The Court therefore ORDERS that judgment be entered VACATING the decision of the Board of Immigration Appeals dated January 20, 1976, regarding Carlos Marcello, and REMANDING this cause to the Board of Immigration Appeals with instructions to conduct a hearing on the validity of petitioner's 1961 deportation, and to further reevaluate and supplement its decision on the issues before it in accordance with this opinion.

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[7]In briefing oral argument for April 25, 1979, petitioner additionally contended that he had been denied oral argument under 8 C.F.R. 3.1(b), in that two members of the majority in the decision of January 20, 1976, were not present for the oral argument.

In *Au Yi Lau v. I.N.S.*, 181 U.S.App.D.C. 99, 55 F.2d 1036 (1977), the court held that where four out of five participants in a Board decision had not been present for oral argument it was not reversible error since the Chairman of the Board had submitted an affidavit to the effect that members who decided the case had had access to a transcript of the oral argument. At the April 25, 1979, hearing, counsel for the Government supplied the Court with the necessary affidavit for the January 20, 1976, decision presently on appeal, and therefore, under *Au Yi Lau*, ibid, this contention of petitioner is without merit.